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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AGUSTIN GARCIA, JR., Defendant and Appellant.	B289784 (Los Angeles County Super. Ct. No. VA135161)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed in part and remanded with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant shot his long-time neighbor in the chest, and a jury convicted him of second degree murder. In this appeal, defendant argues that the trial court erred in instructing the jury and in imposing any fines, fees or restitution. We independently asked the parties to brief whether defendant is entitled to a remand for the trial court to consider whether to strike the 25-year firearm enhancement imposed in this case. None of defendant's arguments has merit, but defendant is entitled to a remand. Accordingly, we affirm his conviction but remand with instructions to consider whether to strike the firearm enhancement.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Agustin Garcia, Jr. (defendant), Paul Lopez (Lopez) and Dayvon Andrew Brazile (Brazile) are all members of the Whittier, California-based Jim Town gang. Between 2004 and 2014, defendant lived with his family in Jim Town gang territory; his next door neighbors were Richard Mationg (Mationg), Mationg's parents, and his two younger brothers. Although defendant and Mationg used to get along, in the years prior to 2014, they argued and occasionally got into fist fights.

Around 9 p.m. on May 10, 2014, Mationg and his father were sitting on their front porch drinking beer. A car screeched to a halt in front of the Mationg residence, and Lopez, Brazile and a third man who later introduced himself as "Whisper from Jim Town" got out of the car and, as they walked across the Mationgs' front lawn, started yelling at them. The night before, Mationg's youngest brother had walked down their street shouting, "Fuck Jim Town."

One of the three men put his arm around Mationg's shoulders, said, "Let's take a walk," and led Mationg from the front porch out into the middle of the street. The other men followed. Soon thereafter, defendant came out of his house. Although it is not clear whether a fist fight broke out between the three men and Mationg *before* defendant joined, defendant and Mationg traded taunts and punches.

When Mationg started to hold his own against his assailants, defendant backed away, pulled out a gun and aimed it at Mationg's chest. With his fist balled up at his sides, Mationg told defendant either "You're a bitch with that gun" or "You're a bitch." Defendant then pulled the trigger and put a bullet in Mationg's chest that killed him.

Defendant then got into a car with the others and drove off.

II. Procedural Background

The People charged defendant with murder (Pen. Code, § 187, subd. (a)).[1] The People further alleged that the murder was "for the benefit of, at the direction of, or in association with a criminal street gang" (§ 186.22, subd. (b)(1)(C)) and that a principal in the crime had discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)).

The trial court instructed the jury on the crimes of first degree murder, second degree murder and voluntary

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1 The People also charged Lopez and Brazile with murder, charged Lopez with assault with a firearm (§ 245, subd. (a)(2)) and charged Brazile with voluntary manslaughter (§ 192, subd. (a)). The other defendants were tried separately, and are not part of this appeal. All further statutory references are to the Penal Code unless otherwise indicated.

manslaughter (as a lesser included offense due to imperfect self-defense and due to provocation / heat of passion as well as on perfect self-defense.[2]

The jury found defendant guilty of second degree murder, and found true both the firearm and gang allegations.

The trial court sentenced defendant to prison for 40 years to life. This sentence was comprised of a base sentence of 15 years to life for the second degree murder count plus 25 years to life for the firearm enhancement. The court struck the gang enhancement for purposes of sentencing. The court also imposed direct restitution of $12,563.70 to the Mationg family and $7,000 to the Victim Compensation Board, the latter to "to reimburse payments" previously made to the Mationgs. The court also imposed a $300 restitution fine, a $30 criminal conviction assessment and a $40 court operations assessment.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Instructional Issues

Defendant argues that the trial court erred in instructing the jury because (1) the court did not instruct the jury on imperfect defense *of others*, and (2) the court's instructions effectively prevented the jury from convicting him of the lesser included crime of voluntary manslaughter. We independently review claims of instructional error. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

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[2] The trial court also instructed the jury on the lesser included offense of involuntary manslaughter, but later instructed the jury to disregard that instruction.

A. *Imperfect defense of others*

If a criminal defendant unlawfully kills another person because he "actual[ly], but unreasonabl[y], belie[ved] that he [or someone else] . . . [was in] imminent danger of death or great bodily injury" (so-called imperfect self-defense or imperfect defense of others), he is guilty of voluntary manslaughter rather than murder. (*People v. Michaels* (2002) 28 Cal.4th 486, 528 (*Michaels*); *People v. Randle* (2005) 35 Cal.4th 987, 997.) Because voluntary manslaughter is a lesser included offense to murder (*People v. Barton* (1995) 12 Cal.4th 186, 200-201), a trial court is required to instruct a jury on imperfect self-defense or imperfect defense of others only if there is "substantial evidence" from which a reasonable jury """could . . . conclude[]""" "'that the lesser offense [of voluntary manslaughter], but not the greater [offense of murder], was committed.'" (*People v. Cruz* (2008) 44 Cal.4th 636, 664; *People v. Hughes* (2002) 27 Cal.4th 287, 366-367, italics omitted.) "Substantial evidence" is not merely "*any* evidence . . . no matter how weak." (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) In assessing whether substantial evidence exists to support a lesser included offense instruction, we construe the record in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

The trial court did not err in declining to instruct the jury on voluntary manslaughter based on the imperfect defense of others because there was not substantial evidence from which a reasonable jury could conclude that defendant, in shooting Mationg, actually but unreasonably believed that anyone else was in "imminent danger of death or great bodily injury." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1066.) At the time defendant joined the fight, there was either *no* ongoing fist fight or a fist

fight in which Mationg was outnumbered by three of defendant's fellow gang members; in either instance, the gang members were not in "imminent danger of death or great bodily injury." Defendant himself then joined or started a fist fight with Mationg and, after a brief melee, backed away, pulled out a gun, and shot Mationg in the chest. These facts all but defeat the inference that defendant harbored any belief in the necessity to intervene to protect anyone else from imminent danger of death or great bodily injury. And defendant's decision not to testify means there was no direct evidence of such a belief.

Defendant makes what amount to two arguments to the contrary.

First, he asserts that there was substantial evidence that he actually believed that his fellow gang members were in imminent danger of death or great bodily injury because police recovered an empty knife sheath in Mationg's front yard and found the corresponding knife beneath a staircase inside of Mationg's house. However, it is undisputed that no one saw Mationg with a knife before or during the fist fight. To the contrary, moments before Mationg was shot, he was balling his fists at his side—something he could only do if he was unarmed. It is also undisputed that neither defendant nor any of his fellow gang members ever *saw* the knife or its sheath at any point that evening. The involvement of a knife in the melee is purely speculative, and "[s]peculation is not substantial evidence" (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851). Defendant seeks to avoid this conclusion by asserting that the People never proved he could *not* see the knife sheath and that his counsel argued the knife was at play in his closing argument. These further arguments lack merit because neither the absence of

evidence nor the argument of counsel constitutes evidence, let alone substantial evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655 ["An absence of evidence is not the equivalent of substantial evidence."]; *People v. Redd* (2010) 48 Cal.4th 691, 743, fn. 25 [""statements and argument of counsel are not evidence"""].)

Second, defendant posits that the trial court should have instructed the jury to consider his long history of animosity with Mationg in evaluating his claim of imperfect defense of others. Under the "antecedent threat" doctrine, a defendant may be "entitled to an instruction on the effect of antecedent threats or assaults by the victim *on the reasonableness of defendant's conduct*." (*People v. Gonzalez* (1992) 8 Cal.App.4th 1658, 1663-1664, italics added and deleted; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065-1066; *People v. Moore* (1954) 43 Cal.2d 517, 528-529.) Thus, such an instruction may be necessary when instructing on perfect self-defense or defense of others, which requires that the defendant's belief is both actual and reasonable. (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1170-1171.) But it is wholly irrelevant where, as here, the issue is imperfect self-defense or defense of others, for which the reasonableness of a defendant's belief in the need for self-defense is irrelevant. (*Michaels*, *supra*, 28 Cal.4th at p. 528.)

B. *Removal of voluntary manslaughter from consideration*

Murder is "the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Voluntary manslaughter is a lesser included offense to murder that exists in "'limited, explicitly defined circumstances'"—namely, (1) "when the defendant acts in a 'sudden quarrel or heat of passion'" or (2) "'when the defendant kills in "unreasonable self-defense" [or

defense of others].'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108, citing § 192 (*Lasko*); *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.) What differentiates murder from voluntary manslaughter is the element of malice aforethought: A defendant who commits an unlawful killing while acting under the heat of passion or laboring under an actual but unreasonable belief in the need for self-defense (or defense of others) is deemed to be acting without malice aforethought. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226; *Lasko*, at pp. 109-110.)

The jury instructions in this case, while wordier than they needed to be, correctly conveyed the above stated law. Using CALJIC Nos. 8.10 and 8.11, the jury was instructed that (1) murder is defined as "unlawfully kill[ing] a human being with malice aforethought"; (2) "malice aforethought" may be either "express or implied"; (3) "express" malice is an "intent[] . . . to kill"; and (4) "implied" malice exists when the killing "result[s] from an intentional act," the "natural consequences" of which are "dangerous to human life," when that "act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." Using CALJIC No. 8.40, which largely parallels CALJIC Nos. 8.10 and 8.11, the jury was instructed that voluntary manslaughter is the "unlawful[] kill[ing] [of] another human being," except "without malice aforethought," but with (1) "an intent to kill" or (2) "conscious disregard for human life," which is defined as a killing that "result[s] from . . . an intentional act," "the natural consequences of which are dangerous to life," when that "act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious

disregard for life."[3] Using CALJIC Nos. 5.17, 8.42, 8.43, 8.50 and 4.33, the jury was instructed on the two circumstances that negate malice aforethought (and that thereby differentiate murder from voluntary manslaughter)—namely, (1) killing a person as a result of a "sudden quarrel or heat of passion," or (2) killing a person "in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury."

Defendant nevertheless argues that these instructions effectively foreclosed the jury from finding him guilty of any type of voluntary manslaughter. Specifically, he argues that the definition of "implied malice" in the murder instruction is the same as the "conscious disregard of human life" in the voluntary manslaughter instruction, which meant that once the jurors concluded that he acted with implied malice, they could never find him guilty of voluntary manslaughter. This danger, defendant continues, was exacerbated by the CALJIC 8.75 instruction that required the jury to reach a verdict about murder before reaching a verdict upon voluntary manslaughter and by the CALJIC 1.22 instruction that incorrectly defined malice as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act."

Defendant's argument rests on a selective—and hence impermissible—reading of the jury instructions. He is correct that the murder and voluntary manslaughter instructions given in this case each effectively use the same definitions of "express

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3 Under this definition, an unintentional killing can be voluntary manslaughter if it is preceded by an intentional act that is, and is known to be, dangerous to human life.

malice" and "implied malice," but he ignores that (i) the murder instruction also requires the jury to find "malice aforethought" and (ii) other instructions informed the jury that malice aforethought (based on either express or implied malice) does not exist if the defendant acts under a heat of passion or in imperfect self-defense. To be sure, the CALJIC instructions do in two steps (defining murder and voluntary manslaughter with parallel language, and then having separate instructions as to when murder is reduced to voluntary manslaughter) what the CALCRIM instructions do in just one step (defining voluntary manslaughter by the circumstances of reduction themselves). This is undoubtedly why CALCRIM is preferred over CALJIC. (Cal. Rules of Court, rule 2.1050(e); *People v. Cornejo* (2016) 3 Cal.App.5th 36, 60.) But, *read as a whole*, even these CALJIC instructions correctly relay the pertinent legal principles and adequately preserve a jury's ability to find defendant guilty of voluntary manslaughter. (Accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 915 [""""we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given""""].) The sole error in these instructions is the definition of malice in CALJIC 1.22. As the People concede, that instruction provided a definition of "malice" that is inapplicable to the crime of murder. However, this error was harmless because "the court also correctly instructed on malice aforethought" as defined for the crime of murder. (*People v. Shade* (1986) 185 Cal.App.3d 711, 715.)

II. Sentencing Issues

A. *Remand for firearm enhancement*

In January 2018, our Legislature for the first time granted trial courts the discretion to dismiss firearm enhancements

pursuant to section 12022.53. (§ 12022.53, subd. (h).) This legislation applies retroactively to persons, like defendant, whose convictions are not yet final. (E.g., *People v. Chavez* (2018) 22 Cal.App.5th 663, 712 (*Chavez*).) Because the trial court sentenced defendant several months *after* the amendments to section 12022.53 took effect and because "[t]he general rule is that a trial court is presumed to have been aware of and followed the applicable law" (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496), the trial court's silence on whether it was aware of its newly conferred discretion and why it elected not to exercise it is, by itself, not enough to disturb the court's ruling. However, where that silence is accompanied by indications in the record that the court misunderstood its discretion, silence cannot be equated with the proper exercise of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 378 ["an abuse of discretion occurs where the trial court was not 'aware of its discretion'"]; *People v. Davis* (1996) 50 Cal.App.4th 168, 172 [error may exist where party "affirmatively demonstrate[s] error on the face of the record"].) In this case, the People's written sentencing memorandum said nothing about the amendment to section 12022.53, but the prosecutor argued during the sentencing hearing that "it is discretionary with the court for the gang and the gun allegation." The court then told the prosecutor that he was wrong in arguing that the court had the discretion to sentence on *both* the gang and gun allegation because the court could impose only one of the two. However, and as the People argue on appeal, the trial court's understanding was *itself* wrong because defendant personally used the firearm. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) This confusion regarding the existence and scope of the trial court's discretion vis-à-vis *both* enhancements undermines

our confidence that the trial court's silence regarding the section 12022.53 enhancement reflected a proper exercise of its discretion. Further, because "the record [does not] 'clearly indicate[]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion'" (*Chavez*, at p. 713; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425), defendant is entitled to a remand.

B. *Fines and restitution*

Defendant argues that *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*) requires us to vacate all of his restitution, fines and fees. He is wrong.

1. *Direct restitution*

Duenas does not call into question the trial court's imposition of $19,563.70 in direct restitution—that is, $12,563.70 to the Mationg family and $7,000 to the Victim Compensation Board "to reimburse payments" previously made to the Mationgs. That is because the issue of "[d]irect victim restitution" was, in *Duenas*'s own words, "not at issue" in that case. (*Id.* at p. 1169.) What is more, defendant waived any objection to this amount because he had a statutory right to contest the amount of restitution (§ 1202.4, subd. (f)(1)) and, rather than exercising that right, told the court that the direct restitution amounts "all seem[] very legitimate" and went on to "stipulate to that amount." This constitutes a waiver. (*People v. Case* (2018) 5 Cal.5th 1, 53 [so holding].)

2. *Restitution fines and fees*

Citing the constitutional guarantees of due process and excessive fines, *Duenas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the $40 court operations assessment (§ 1465.8), the $30 criminal

convictions assessment (Gov. Code, § 70373), and the $300 minimum restitution fine (§ 1202.4)—without first ascertaining the "defendant's present ability to pay." (*Duenas*, supra, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) So *Duenas* applies to the $370 in fines and fees imposed in this case. However, we need not grapple with *Duenas*'s validity because the record in this case, unlike the record in *Duenas* itself, indicates that defendant has the ability to pay the $370 in assessments in this case. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].) A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) Prisoners earn wages of at least $12 per month). (Dept. of Corrections, Operations Manual, §§ 51120.6, 51121.10 (2019).) At even this minimum rate, defendant will have enough to pay the $370 in assessments and fines in 31 months, which is long before his 40 year sentence would end (or, if the trial court elects to strike the 25-year firearm enhancement or to impose a lesser firearm enhancement, before his lesser sentence would end). Even if defendant does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1093.) In light of these statutes, we reject defendant's argument that his ability to earn prison wages is "speculative." The record also contains evidence that defendant, at the time of his crime, was employed. Because defendant "points to no evidence in the record supporting his inability to

pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), and hence no evidence that he would suffer any consequence for non-payment, a remand would serve no purpose. Defendant asserts for the first time in his reply brief, and without citation to authority, that the presumption that a defendant sentenced to prison is unable to reimburse the costs of defense "applies equally" to fines and fees. We need not decide whether this assertion is correct because, for the reasons described above, any presumption has been rebutted as to the minimum fines and fees imposed in this case.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under section 12022.53, subdivision (h) (2019). In all other respects, the judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ